No. 92-1168

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

TERESA HARRIS,

Petitioner,

—v.—

FORKLIFT SYSTEMS, INC.,

Respondent.

ON WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN JEWISH CONGRESS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Since its founding in 1920, the ACLU has repeatedly supported the free speech right to express even "offensive" thoughts. The ACLU has also steadfastly defended the right of women to be free from discriminatory treatment in the workplace and elsewhere.

This case touches upon both of these concerns. Specifically, it requires the Court to consider the relationship between free speech principles and the concept of a "hostile working environment" under Title VII. It also requires the Court to clarify the standards for determining liability when a Title VII claim rests, in whole or in part, on allegations of verbal harassment. Because these issues have a direct bearing on the work of the ACLU, we respectfully submit this brief *amicus curiae* to assist the Court in its deliberations.

The American Jewish Congress is a membership organization of American Jews founded in 1918, which seeks to protect the religious, political and economic rights of Jews, and to promote civil rights and liberties for all Americans. It is particularly committed to the principle of sexual equality. It believes that all workers are entitled to an employment environment which is not hostile or abusive and which permits them to realize their fullest potential on the job.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

STATEMENT OF THE CASE

Teresa Harris was employed as a rental manager by Forklift Systems, Inc., a Tennessee corporation, from April 22, 1985 to October 1, 1987. At the time, she was one of six managers employed by respondent; four were male, the one other female manager was the daughter of the company's president, Charles Hardy.

During the approximately eighteen months petitioner worked for Forklift, she was subject to what the Magistrate described as "a continuing pattern of sex-based derogatory conduct from Hardy." Pet.App. at A13. According to the Magistrate's findings, Hardy asked petitioner (and other female employees) to retrieve coins from his front pants pocket. *Id.* at A14. He also threw various objects on the ground and then made remarks about petitioner's clothing when she stooped to pick them up at his direction. *Id.* at A14-A15.[2]

In addition, the Magistrate found that Hardy made a number of discriminatory comments directed at petitioner in front of other employees. These comments fit into two general categories. Some cast doubt on petitioner's ability because she is female. For example: "You're a woman, what do you know"; "You're a dumb ass woman"; and "We need a man as the rental manager." Other comments were overtly sexual. For example: "Let's go to the Holiday Inn to negotiate your raise." *Id.* at A13-A15.[3]

On August 18, 1987, petitioner met with Hardy to complain about his comments and behavior. Hardy apologized (although professing surprise that petitioner had been offended) and promised to reform. This promise was not kept. Within a month, Hardy asked petitioner -- again in front of other employees -- whether she had secured an account by promising sexual favors to the customer. *Id.* at A16-A17.

On October 5, 1987, petitioner filed a discrimination complaint with the EEOC. Two days later, Hardy terminated his business relationship with petitioner's husband, who had been a supplier for Forklift. *Id.* at A20. Hardy also amended petitioner's personnel record after she filed her EEOC complaint "in order," the Magistrate found, "to manufacture a justification for her termination." *Id.* at A19.

Based on these findings, the Magistrate "discount[ed]" respondent's "theory of th[e] case," which was that petitioner had quit because the business relationship between her husband and Forklift had deteriorated. *Id.* at A24. The Magistrate nevertheless ruled that petitioner had failed to establish that she was the victim of sexual harassment under Title VII.[4]

Citing *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987), the Magistrate held that a sexual harassment claim could only be sustained upon proof of "conduct which would interfere with that hypothetical reasonable individual's work performance and affect seriously the psychological well-being of that reasonable person under like circumstances." Pet.App. at A28-A29. He then concluded that Hardy's comments, while "inappropriate," were not "so severe as to be expected to seriously affect [petitioner's]

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[2] It is not clear from the Magistrate's Report how frequently these incidents occurred.

[3] The Magistrate found that petitioner treated this last comment as a joke. *Id.* at A14. He did not make a similar finding with regard to any of Hardy's other remarks.

[4] Under Title VII, it is an "unlawful employment practice" for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. §2000e-2(a).

workplace to be a hostile environment, the plaintiffs could not have been affected because both "were married women with years of waitressing experience who were quite able to take care of themselves"), *aff'd*, 944 F.2d 905 (6th Cir. 1991). Requiring the fact-finder to evaluate whether a plaintiff suffered psychological injury simply increases the likelihood that the employer will seek to introduce evidence of the victim's prior experience. Indeed, short as it is, respondent's opposition to certiorari in this case itself reflects this practice, characterizing petitioner as "a *four-time married* white female". Br. Opp. 1 (emphasis added).

The increased likelihood that a victim's entire personal life would be put on trial simply because she wants to stop sexual harassment could well discourage women from vindicating their rights under Title VII. Worse, it could send a message to employers and coworkers that any woman who had not lived a "saintly" life would be fair game for offensive and discriminatory harassment.

A psychological injury requirement is also problematic because courts may unduly rely on potentially misleading evidence in evaluating the nature and extent of injury. To rebut a claim that a plaintiff suffered psychological injury; an employer may argue that a plaintiff who did not exhibit visible distress could not have suffered psychological injury. Studies suggest, however, that the plaintiff's contemporaneous, visible reaction to the conduct may not accurately reflect the effect on her.[14]

[14] A survey of ten studies of sexual harassment found that a median of 41% of harassment victims used various avoidance techniques, such as avoiding or ignoring the harassment, and an additional 24% sought to defuse the situation through means such as joking or stalling. Twenty-three percent used some form of negotiation, such as asking the harasser to stop, while only 10% used confrontation, such as telling the harasser to stop, making a formal complaint, or hitting the harasser. James Gruber, *How Women Handle Sexual Harassment: A Literature Review*, 74 Sociol. & Social Res. 3, 5 (1989).

Many victims of sexual harrasment cannot afford—financially—to complain openly about the conduct they find offensive. *See, e.g.*, USMSPB at D-27 (89% of female harassment victims reported that they needed their jobs quite a bit or a great deal); Estrich, *supra*, 43 Stan. L. Rev. at 846. A victim of harassment may legitimately fear retaliation if she complains or even if she resists or acts offended. The employer's power over the employee translates into subtle—or, in some cases, overt—economic blackmail of the victim. She can endure the harassment without complaint or risk losing her job. Under these circumstances, the victim's visible reactions on the job cannot be regarded as dispositive of whether the harassment caused "psychological injury." [15]

There are other reasons why a victim may be reluctant to reveal her objection to harassing conduct, particularly to the harasser or to coworkers who condone the harassment. Much hostile environment harassment is done for the purpose of demeaning, degrading or belittling the victim has been demeaned.[16] In addition, if the victim coworkers. *See, e.g.*, Abrams, *supra*, 42 Vand. L. Rev. at 1201-02. Where the victim reveals the pain caused by the harassment, the harasser has achieved his goal—the victim has been demeaned.[16] In addition, if the victim does not hide her initial reactions, she risks being branded "overly sensitive" or losing her job on the ground that she is not a "team player."

The very coping mechanisms that can help the victim to endure harassment might, by the Sixth Circuit's test, prevent her from ever forcing the employer to stop the

[15] The problem identified here is not, unfortunately, unique to a psychological injury requirement. It also infects the "unwelcomeness" requirement articulated by this Court in *Meritor*.

[16] A classic coping mechanism for victims of harassment is to pretend that the conduct does not bother them. *See* Gruber, *supra*; U.S. Merit Systems Protection Board, *Sexual Harassment in the Federal Government: An Update* 24 (1988).

conduct. This case illustrates the point. The magistrate found that petitioner was not "subjectively so offended that she suffered injury," relying on the finding that she had "cursed and joked and appeared to her coworkers to fit in quite well with the work environment." Pet. App. A-19. The magistrate apparently concluded that this evidence outweighed petitioner's testimony that she experienced "anxiety and emotional upset . . . and cried frequently" at home. *Id.* at A-10. Because petitioner apparently hid the pain she felt as a result of the employer's harassment *while she was at work*, the magistrate was unwilling to conclude that she suffered any significant pain, and therefore refused to find liability.

II. IF THE COURT CHOOSES TO SPEAK MORE BROADLY ON THE ELEMENTS OF A HOSTILE ENVIRONMENT HARASSMENT CASE, IT SHOULD CORRECT TWO ADDITIONAL LEGAL ERRORS COMMITTED BY THE COURTS BELOW.

The sole question presented in this case is whether a plaintiff alleging hostile environment sexual harassment must prove that she suffered severe psychological injury. As we demonstrated above, no such requirement does or should exist in Title VII.[17] The Court need not speak further on the elements of a Title VII hostile environment case until it has before it a case in which such issues are more directly presented. However, should the Court choose to speak more broadly about the elements necessary to establish liability in such a case, it should correct several additional legal errors reflected in the decisions below.

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[17] The Court should therefore reverse the decisions below with respect to the hostile environment claim and direct the entry of judgment for the petitioner. The Court should also reverse the constructive discharge holding. That holding rested on the same errors of law as did the hostile environment ruling. The employer's failure to correct the hostile conduct—indeed, his escalation of it—following petitioner's complaint compelled her to resign.

A. The Courts Below Improperly Required Petitioner To Prove Both Adverse Effects On Her Work Performance And A Hostile Environment.

The courts below applied a legal standard that is based on the Sixth Circuit's erroneous rewording of standards set out in *Meritor* and the EEOC guidelines. The magistrate held that petitioner was required to prove not only that her employer created an offensive working environment, but also that the conduct interfered with her work performance. Pet. App. at A-19. Application of this dual requirement both lacks legitimate foundation and undermines the purposes of Title VII.

The magistrate applied the *Rabidue* majority's fourth element for a hostile environment claim:

> the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance *and* creating an intimidating, hostile, or offensive working environment that affected seriously the psycho logical [sic] well-being of the plaintiff.

Rabidue, 805 F.2d at 619 (emphasis added). This test largely repeated the test articulated by the EEOC in its 1980 Guidelines and quoted with approval by this Court in *Meritor*:

> sexual misconduct constitutes prohibited "sexual harassment," . . . where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance *or* creating an intimidating, hostile, or offensive working environment."

Meritor, 477 U.S. at 65 (quoting 29 C.F.R. § 1604.11 (a)(3)) (emphasis added). However, the Sixth Circuit not only imported the psychological injury requirement discussed above in Part I, but also inexplicably substituted the conjunctive "and" for the disjunctive "or."

By substituting "and" for "or," *Rabidue* and its progeny have doubled the burden on plaintiffs seeking to challenge hostile working environments. It is no longer enough, hold these courts, that an employee prove that her working environment was intimidating, hostile or of-

fensive. Rather, she must also prove that the conduct had the effect of "unreasonably interfering with [her] work performance." That rule is clearly wrong.[18] Under the EEOC guidelines and *Meritor*, a plaintiff need prove only one or the other.[19]

A person who refused to allow a hostile environment to interfere with her work performance could never successfully challenge that environment under the *Rabidue* standard. *E.g., Staton* v. *Maries County*, 868 F.2d 996 (8th Cir. 1989) (plaintiff's ability to work regular shifts for ten days following rape by her supervisor proved that the rape did not alter the conditions of her employment). Qualities such as strength, fortitude, professional pride and a healthy work ethic that should be assets in any employee would become liabilities in a Title VII case. *Cf. Stewart* v. *Cartessa Corp.*, 771 F. Supp. 876, 881 (S.D. Ohio 1990) (the employer should not be able to use the fact that the plaintiff is a "diligent, intelligent and productive worker" as a defense to a hostile environment claim.) The effect of such a requirement would be to force victims of hostile environment harassment to endure such harassment *until* it "unreasonably interfere[d] with [their] work performance" or to leave their jobs. Title VII imposes no such choice.

[18] As we note above, hostile environment sexual harassment may well adversely affect the victim's work performance. *See supra* pp. 12-13. It does not have that effect on every victim, however, and no victim should be forced to endure harassment *until* it adversely affects her performance.

[19] In addition to quoting the EEOC guidelines with approval, this Court in *Meritor* stated that conduct must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Meritor*, 477 U.S. at 67 (quoting *Henson*, 682 F.2d at 904). The Court's quotation of *Henson*'s use of the conjunctive in that context did not change the basic standard articulated in the EEOC guidelines and approved by this Court. Rather, it merely recognizes that conduct that is severe or pervasive enough to alter employment conditions would necessarily result in an abusive working environment. The EEOC guidelines make clear that a Title VII plaintiff is required only to prove either unreasonable interference with work performance or a hostile working environment.

B. Application Of "Reasonableness" Standards For Determining The Severity Or Pervasiveness Of Harassing Conduct Has Legitimated Discriminatory Conduct And Reinforced Stereotypes.

To be actionable under Title VII, harassing conduct must be severe or pervasive enough to alter the "terms, conditions or privileges" of the plaintiff's employment. Under *Meritor*, an actionable hostile environment exists where conduct is "sufficiently severe or pervasive 'to alter the conditions of [the victims's] employment and create an abusive working environment.'" *Meritor*, 477 U.S. at 67 (citations omitted). Similarly, under the EEOC guidelines, quoted with approval by this Court, an actionable hostile environment exists where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." 29 C.F.R. § 1604.11(a)(3). These formulations serve to ensure that a plaintiff will succeed in hostile environment cases only if the "terms, conditions, or privileges" of her employment were affected; an isolated epithet will not give rise to liability.

Nevertheless, the magistrate in this case followed the lead of the Sixth Circuit (and many other lower courts) by requiring petitioner to show not only that the conduct affected the "terms, conditions, or privileges" of her own employment, but that it would have affected the "terms, conditions, or privileges" of employment of some hypothetical "reasonable" person or woman. This extra burden of satisfying a "reasonableness" standard in hostile environment harassment cases has no basis in Title VII and undermines Title VII's purposes. Title VII protects individual members of groups, not a hypothetical composite plaintiff.

Nothing in the language of Title VII, *Meritor*, or the EEOC guidelines requires courts to import a "reasonableness" requirement in the case of plaintiffs alleging hostile environment harassment. Under *Meritor*, once an employee has established that she was subjected to sexual remarks or other status-based conduct that she did not welcome, that the conduct was severe or pervasive enough "to alter the conditions of [the victim's] employment and create an abusive working environment," *Meritor*, 477 U.S. at 67 (citations omitted), and that the employer is responsible for the conduct, she has established liability for a hostile work environment. The Court did not require proof that the conduct would have affected some hypothetical "reasonable person" in the same way as it affected the victim.[20]

Experience has shown that application of a "reasonableness" criterion has served as a barrier to full realization of the right to a workplace that is free from "discriminatory intimidation, ridicule, and insult." *Meritor*, 477 U.S. at 65. It has provided courts with a yardstick that is infected with discriminatory assumptions that serve to bar legitimate claims. In the sections below, we explain some of the more significant difficulties that have arisen in connection with these "reasonableness" standards, discussing both the "reasonable person" and the "reasonable woman" standards.

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[20] Courts may have adopted "reasonableness" standards to shield employers from "hypersensitive" employees. *See, e.g., Ellison*, 924 F.2d at 879. We suspect, however, that this threat is largely illusory. The rigors of litigation themselves present substantial deterrents to all potential plaintiffs. Moreover, the elements of a hostile environment claim provide sufficient safeguards against hypersensitive plaintiffs. If the conduct is sexual, unwelcome, and sufficiently severe or pervasive to alter the terms and conditions of employment, an employer should have no legitimate interest in perpetuating such conduct. Courts must ascribe content to the severe or pervasive criterion set forth in *Meritor* on a case-by-case basis, evaluating the conduct as it affects the victim's work environment.

1. *Application of a "Reasonable Person" Standard Has Had the Effect of Perpetuating Discriminatory Conditions and Stereotypes.*

A number of lower courts have held that, for conduct to be "severe or pervasive enough 'to alter the conditions of [the victims's] employment and create an abusive working environment,'" *Meritor*, 477 U.S. at 67 (citations omitted), it must have had that effect not only on the plaintiff herself, but also on a "reasonable person."[21] On its face, this formulation sounds harmless enough. In application, however, it has the potential to perpetuate the very discriminatory conditions that Title VII was intended to eliminate. In some cases, the "reasonable person" standard has served as a powerful engine of the status quo.

One of the most disturbing examples is the majority opinion in *Rabidue*. The *Rabidue* majority held that a court must "adopt the perspective of a reasonable person's reaction to a similar environment under essentially like or similar circumstances." 805 F.2d at 620. The court refused to find Title VII liability despite evidence of highly offensive sexual conduct in the plaintiff's workplace. As grounds for condoning such conduct, the majority quoted with approval the district court's reference to the widespread existence of abusive conduct in society at large:

> "Indeed, it cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to—or can—change this. It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was de-

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[21] *See, e.g., Rabidue*, 805 F.2d at 620; *Brooms* v. *Regal Tube Co.*, 881 F.2d 412 (7th Cir. 1989).

> signed to bring about a magical transformation in the social mores of American workers."

805 F.2d at 620-21 (quoting 584 F. Supp. at 430). The majority concluded that the prevalence of "erotica" in society at large rendered the effect of the harassing conduct on the plaintiff's work environment "de minimis." *Id.* at 622.

The "reasonable person" through whose eyes the *Rabidue* majority viewed the conduct at issue must have been the men working at Osceola Refining prior to the time Ms. Rabidue arrived. Only this formulation could account for the "factors" that the court weighed in determining the "reasonable person's reaction to a similar environment":

> background and experience of [plaintiff's] coworkers, and supervisors, . . . the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs, coupled with the reasonable expectation of the plaintiff upon voluntarily entering that environment.

Id. at 620. Application of this standard grandfathered any conduct that predated the plaintiff's arrival in the workplace, presenting a highly effective barrier for any person unwilling to accept that workplace "as is."

The implications of that ruling are stark. Under *Rabidue*'s application of the "reasonable person" standard, a woman must endure truly outrageous conduct as a condition of her employment. For example, a requirement of Ms. Rabidue's job was that she meet regularly with a fellow manager who "routinely referred to women as 'whores,' 'cunt,' 'pussy,' and 'tits.'" *Id.* at 624 (Keith, J., dissenting). The *Rabidue* court's application of the "reasonable person" standard also condones widespread display in the workplace of pictorial displays that demean women.[22]

[22] The court's suggestion that "erotica" pervades society misses an important distinction between society as a whole and a confined workplace. "Girlie" magazines are not generally displayed openly on newsstands, and no one is forced to purchase them. Television has a power switch, a tuner, dozens of channels from which to choose, and decency standards. Movies have ratings for sex, violence and language. *Cf. Rabidue*, 805 F.2d at 622. The common element is free choice—one is subjected to "erotica" only if one chooses to be. The workplace is another matter altogether. If pornography is displayed in areas that an employee must frequent incident to his or her job, he or she has lost the free choice to view such material or not. A woman who must choose between viewing lewd and demeaning pictures every day and quitting her job can hardly be said to have a "free" choice.

It is beyond comprehension that Congress intended that women should be required to endure such treatment in the workplace, but that is what the *Rabidue* majority found to be acceptable under a "reasonable person" standard.[23] The court's application of the standard effectively bars access to the Osceola Refining workplace by any woman who seeks to be viewed and addressed as a colleague and coworker, rather than in crude and demeaning terms involving her sexual anatomy. The company could not have excluded women from management positions any more effectively by posting a "no women managers need apply" sign at the door.

A "reasonable person" standard almost inevitably condones offensive and demeaning conduct at some level because it incorporates the views of those doing the harassing—or those who are indifferent or blind to the barriers to equal access erected by others' harassment. *See, e.g., Walker* v. *Ford Motor Co.*, 684 F.2d at 1359 (manager counseled black employee that racial epithets were "just something a black man would have to deal

[23] The court's suggestion that the pervasiveness of discrimination in a workplace provides grounds for refusing to find Title VII liability turns the statute on its head. When Congress enacted Title VII, it did so not because it thought that employment discrimination was the rare exception; rather, it knew that such discrimination was pervasive and sought to eradicate it. *See, e.g.*, H.R. Rep. No. 914, *reprinted in* 1964 U.S.C.C.A.N. 2355, 2401.

with in the South"). After all, the perpetrators of much conduct that courts have characterized as harassment presumably think their conduct is perfectly reasonable. But if the harasser's conduct erects a barrier to equal access to the workplace, his viewpoint—or that of others like him—about the reasonableness of the conduct or the environment it creates should be irrelevant.

Finally, courts may wrongly assume that it is appropriate to include within the universe of "reasonable persons" members of protected groups who appear to have been, like many of the female clerical employees at Forklift Systems, "conditioned to accept denigrating treatment." Pet. App. at A-18. Some of these employees may have endured denigrating treatment in silence because of fears of retribution. Such conditioning or silent endurance must not set the standard for what constitutes actionable harassment. Title VII cannot be limited by the acquiescence of some—or even of all but one—to barriers to equal access.

Even if the fact-finder believes that he or she is viewing the conduct at issue objectively, that view may well be a product of his or her own subjective biases, biases at odds with Title VII's goals. The Court should apply the *Meritor* standards as stated, without importing a reasonableness inquiry.[24]

2. *Application of a "Reasonable Woman" Standard Can Also Create Or Perpetuate Discriminatory Stereotypes.*

In an effort to address some of the problems inherent in the "reasonable person" test described above, a number of courts have substituted a "reasonable woman" test for the "reasonable person" test of *Rabidue* and its progeny.[25] Nevertheless, the "reasonable woman" test has the potential to undermine Title VII's goals as much as the "reasonable person" test.[26]

First, the "reasonable woman" standard suffers some of the same infirmities as the "reasonable person" standard. A court may incorporate into the standard the reactions of women who have endured harassment in silence or who have been "conditioned to accept it." Indeed, the courts below did just that. *See* Pet. App. at A18, A-20-A-21. For example, a court may assume that if women employees other than the plaintiff did not complain about the harassment, it must not have altered *their* working conditions, and therefore should not have altered the plaintiff's. But that assumption would perpetuate discriminatory conditions that Congress wished to eliminate.

Second, fact-finders applying a "reasonable woman" test may imbue that standard with their own biases about the types of jobs that women ought to accept or about the "types" of women who take certain jobs. A fact-finder who believed that women should not work as, say, managers, or welders, or construction workers, might be inclined to find that any woman who would accept such a position "is asking for it." *E.g.*, *Downum* v. *City of Wichita*, 675 F. Supp. 1566, 1570 (D. Kan. 1986) (invitation to firefighter to join men in the shower because she

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[24] Should the Court modify the *Meritor* standards to incorporate a reasonableness inquiry, it should carefully craft that inquiry to consider the harassing conduct through the eyes of one who seeks equal access to the workplace and who recognizes the barriers to equal access created by such conduct as status-based slurs, propositions, and fondling, which focus on a woman's sexuality rather than on her competence in her job, and displays in the workplace of material that demeans an entire group.

[25] *See, e.g., Ellison* v. *Brady*, 924 F.2d 872 (9th Cir. 1991); *Andrews* v. *City of Philadelphia*, 895 F.2d 1469 (3d Cir. 1990); *Yates* v. *Avco Corp.*, 819 F.2d 630 (6th Cir. 1987); *Robinson* v. *Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), *appeal docketed*, No. 91-3655 (11th Cir. 1991).

[26] We recognize that some courts adopting a "reasonable woman" standard have done so in recognition of women's special concerns about sexual threats. *See, e.g. Ellison*, 924 F.2d at 878-80. These good intentions aside, this test has at times been used to deny relief to women with legitimate claims and to reinforce gender-based stereotypes. Petitioner's claim is just such a case.

was "doing a man's job" had a *de minimis* effect); *cf.* Abrams, *supra*, 42 Vand. L. Rev. at 1203. Such a finding would directly contravene Title VII's promise of equal job opportunity to any person who can perform the work.

Finally, although any court reviewing a sex-based or sexual harassment claim must take account of the realities women face, the "reasonable woman" test presents the risk of limiting opportunities for women based on gender stereotypes. It would be inappropriate and contrary to Title VII's purposes to apply any standard that expressly or impliedly rested on, for example, an assumption that women are somehow more delicate than men, and are therefore less able than men to cope with ordinary workplace pressures. Gender-specific standards based on such stereotypes have historically been used to "protect" women in a manner that denied them opportunities in the workplace. *E.g.*, *Goesaert* v. *Cleary*, 335 U.S. 464 (1948) (upholding statute that allowed women to serve as waitresses in taverns, but barring them generally from more lucrative positions as bartenders); *cf.* *Rosenfeld* v. *Southern Pacific Co.*, 444 F.2d 1219, 1225-27 (9th Cir. 1971) (paternalistic state labor laws restricting employment opportunities for women are no defense to Title VII claim). Such a "protective" approach would only perpetuate the notion that women are incapable of handling the work-related stresses and conflicts that accompany many jobs. Title VII does not and should not insulate women from work-related stresses and conflicts incident to a particular career or occupation.

Seven years ago, this Court held that unwelcome, sex-based conduct constitutes actionable sexual harassment if it is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Meritor*, 477 U.S. at 67. The working environment of concern to this Court in *Meritor* was the victim's, not that of some hypothetical composite plaintiff. The Court should reaffirm the standards articulated in *Meritor*.

CONCLUSION

For the reasons stated above, the Court should reverse the decisions below and direct entry of judgment for the petitioner.

Respectfully submitted,

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April 30, 1993

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APPENDIX

APPENDIX

The *Women's Legal Defense Fund* (WLDF) is a non-profit, tax-exempt, national advocacy organization founded in 1971 to advance the rights of women in the areas of work and family. WLDF represents women and men challenging barriers to sexual equality, principally those in employment. It does so through litigation of significant cases, public education, and lobbying for improvements in the equal employment opportunity laws and in their interpretation.

The *National Women's Law Center* ("Center") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since its inception in 1972, the Center has worked continuously to make Title VII's promise of equality in the workplace a reality. The existence of widespread sexual harassment in employment greatly restricts the opportunity for women to participate as full partners in the workplace. The Center has a deep and abiding interest in insuring that Title VII adequately protects women from sexual harassment in employment.

The *American Federation of State, County and Municipal Employees, AFL-CIO* ("AFSCME") is a labor organization with approximately 1.3 million members in the United States. AFSCME members are employed by state, county and municipal governments, as well as private and non-profit employers. Each year AFSCME and its affiliates negotiate hundreds of collective bargaining agreements with public and private employers. AFSCME as an institution and AFSCME members as individuals have an abiding interest in eradicating all forms of sexual harassment from the workplace.

Ayuda, Inc. is a non-profit legal services agency, founded in 1971, which offers legal representation and social service assistance to indigent Spanish-speaking and

foreign born residents of the District of Columbia. Since 1985, Ayuda has represented 98% of the Spanish-speaking battered women who turn to the D.C. Courts for protection. A great number of Ayuda's clients are Latina heads of household who, as well as facing violence at home, suffer all forms of discrimination in the workplace.

The *Bar Association of San Francisco* ("BASF") is a voluntary membership organization of over 9,500 men and women practicing law in San Francisco, California. For many years, BASF has sought to promote the rights of women and minorities to equal protection of the laws as well as the right to be treated with dignity and respect. BASF is especially interested in this case because it believes that working conditions free of sexual harassment are essential to a productive society that values the dignity of all persons.

California Women Lawyers ("CWL") is one of the largest women's bar associations in the nation, representing the interests of over 30,000 women lawyers. CWL's mission is to promote the advancement of women and the achievement of gender parity. Toward that end, CWL has authored sexual harassment policy guidelines for the workplace which have been endorsed by the California/Nevada Women Judges Association, the National Association of Women Lawyers, and numerous law firms and bar associations throughout California.

The *Center for Women Policy Studies* was founded in 1972 as the first national policy research and advocacy institute focused exclusively on issues of social and economic justice for women. The Center conducts research and advocacy programs on sexual harassment, violence against women, employers' work/family and "diversity" policies, education, and other relevant issues.

The *Coalition of Labor Union Women* ("CLUW") is America's only national organization for union women. Not a union itself, CLUW strives to make organized

labor—and the public in general—more sensitive to the needs of working women and their families. CLUW has 75 chapters nationwide and over 20,000 members representing more than 60 unions. Since 1974, CLUW has fought for decent wages and working conditions, and a stronger voice for workers in society.

The *Committee for Justice for Women of North Carolina* was founded in 1988 by women who have suffered human, civil, and constitutional rights violations to educate the public about the injury caused by this illegal and immoral behavior. Having been the victims of sexual harassment, members of the organization have first-hand knowledge of the harm caused by sexual harassment. The organization believes that every person has the right to be treated with dignity and respect and to work in a non-discriminatory environment.

Federally Employed Women, Inc. ("FEW") is an international non-profit organization representing more than 1 million civilian and military women employed by the federal government. Since its inception in 1968, FEW's primary objective has been to eliminate sex discrimination and enhance career opportunities for women in government. FEW has vigorously pursued activities designed to educate workers on the issue of sexual harassment, extend protection and relief to its victims, and insure that employers and employees are held responsible for illegal acts.

The *Federation of Organizations for Professional Women* ("FOPW") is a federation of 30 professional women's organizations founded in 1972 to work together to study the issues that impact the careers of professional women, to educate professional women on those issues and to provide mutual support. FOPW is particularly interested in sexual harassment and discrimination issues because we have found that, aside from severe physical illness, the experience of harassment or discrimination has the single most devastating effect on a professional

woman's career. For this reason, FOPW has established the Professional Women's Legal Fund of FOPW and a Support Group for professional women who have been sexually harassed or discriminated against.

The *Institute for Women's Policy Research* ("IWPR") is a non-profit, scientific research organization that works on issues related to economic and social justice for women. IWPR conducts research on policy issues affecting women's lives and represents women's interests in national policy debates. IWPR takes an interest in *Harris* v. *Forklift Systems, Inc.* because a work environment free of hostility and inequity is crucial if women are to preserve economic security for themselves and their families.

The *Mexican American Women's National Association* ("MANA") is a non-profit Latina advocacy organization with members in 36 states. Far too many women suffer sexual harassment on the job that goes unreported. MANA is interested in this case because it believes that our laws should not inhibit sexual harassment victims from seeking relief in the courts.

The *National Association of Female Executives* ("NAFE") represents over 250,000 working women for whom it provides educational and advocacy activities related to the members' careers. NAFE members consider sexual harassment to be one of the most important issues confronting working women. NAFE is interested in this case because it will determine important sexual harassment issues for all women.

The *National Association of Social Workers, Inc.* ("NASW") is the largest association of professional social workers in the world with over 142,000 members in 55 chapters nationally and internationally. Founded in 1955, NASW is devoted to promoting the quality and effectiveness of social work practice. A substantial majority of NASW's members are women, many of whom have experienced first-hand sex discrimination in employment. Thus, NASW is keenly interested in the issues raised in this case.

The *National Center for Lesbian Rights* ("NCLR", formerly the Lesbian Rights Project) is a non-profit public interest law firm devoted to the legal concerns of women who encounter discrimination on the basis of their sexual orientation. Founded in 1977, NCLR has a strong history of assisting lesbians who have been discriminated against in the workplace. NCLR has also demonstrated its commitment to equal treatment in the workplace through litigation and community education.

The *National Council of Negro Women, Inc.* ("NCNW"), established in 1935, is a voluntary non-profit membership organization committed to the advancement of educational, social, and economic opportunities for African American women. Through 33 national affiliate organizations and 250 community-based groups in 42 states, NCNW reaches out to 4 million women. As an organization of African American women, the issues of discrimination and harassment are of utmost concern.

9to5, National Association of Working Women is a membership organization of working women. As an organization which has spoken to literally thousands of victims of sexual harassment, 9to5 knows well the harm it causes. Any level of embarrassment, intimidation, or humiliation ought not be tolerated in the workplace.

The *Older Women's League* ("OWL") was founded in 1980 to address the concerns of midlife and older women. It presently includes 20,000 members and more than 100 chapters in 36 states. Midlife and older women will be profoundly affected by the issues raised in this case. As an increasingly large part of the workforce, these women often face sex, age, and race discrimination in employment.

Trial Lawyers for Public Justice, P.C. ("TLPJ") is a national public interest law firm that marshals the skills and resources of trial lawyers to create a more just so-

ciety. Supported by a nationwide network of over 1,300 trial lawyers, TLPJ utilizes creative litigation to protect people and the environment, guard access to the courts, and combat threats to our justice system. TLPJ is extremely interested in this case because it will determine whether the courts remain open to all victims of sexual harassment.

Wider Opportunities for Women ("WOW") is a non-profit women's employment organization committed to working nationally and locally in its home community of Washington, D.C. to achieve economic independence and equality of opportunity for women and girls. WOW helps women learn to earn, with programs stressing literacy, technical and non-traditional skills, and career development. Sexual harassment remains one of several barriers that women encounter in the workplace. In order for WOW to achieve its goals, working environments must be made free of sexual harassment and all other forms of discrimination.

Women Employed is a national membership association of 2000 working women based in Chicago. Since 1973, the organization has assisted thousands of working women with sex discrimination problems, analyzed equal opportunity policies, monitored the performance of equal opportunity enforcement agencies, and developed proposals for improving enforcement efforts. Women Employed strongly believes that sexual harassment in the workplace is one of the chief barriers to achieving equal opportunity and economic equity for working women.

Women's Action Alliance ("Alliance"), established in 1971, is a national non-profit organization dedicated to furthering the vision of self-determination for all women. The Alliance creates and implements innovative multicultural programs addressing issues of equity in education and the workplace, health, domestic violence, sexual harassment, and income generation. Alliance programs provide individuals, community organizations,

women's centers and schools with strategies and technical assistance to empower women and girls. The organization is dedicated to protecting women's rights in our judicial system.

The *Women's Bar Association of the District of Columbia* ("WBA") is a membership organization composed of nearly 2,000 lawyers, judges, and law students working in private and government practice in the D.C. metropolitan area. Founded in 1917, the WBA is one of the oldest, largest, and most active women's bar associations in the country. The WBA recognizes that sexual harassment in the workplace remains a pervasive problem that impedes women's progress toward equal opportunity.

The *Women's Law Center of Maryland* is an advocacy organization whose membership includes attorneys and judges in the State of Maryland. In existence since 1971, the goal of the Women's Law Center is to promote the legal rights of women through litigation, legislation, and education. The Women's Law Center has a long history of involvement with sexual harassment claims. The Women's Law Center believes the issues raised in *Harris v. Forklift Systems, Inc.* are critical to the legal rights of women.

The *YWCA of the U.S.A.* is part of a world body of YWCAs with associations in 90 countries. In the U.S. alone, there are approximately 400 community and student YWCAs reaching more than 2 million people of diverse ages, races, ethnicities, religions, lifestyles, and interests. Since its inception in 1858, the YWCA has advocated for the rights of women workers and for racial and sexual equality in the workplace. Sexual harassment remains a serious barrier to equal opportunity in the workplace. Any policy that deprives employment discrimination victims of a remedy greatly undermines the goals of our civil rights laws.